

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Proposal of

THE WIRELESS COMMUNICATIONS
ASS'N INTERNATIONAL, INC. et al.

) RM-10586
DA 02-2732

To Revise the Commission's MDS and ITFS Rules)

To: The Wireless Telecommunications Bureau

**COMMENTS OF THE ALLIANCE OF
INDEPENDENT WIRELESS VIDEO OPERATORS**

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SUMMARY

The Alliance of Independent Wireless Video Operators (“the Alliance”) does not generally oppose the recommendations made by The Wireless Communications Association International, Inc., the National ITFS Association, and the Catholic Television Network (collectively “Petitioners”) in their paper entitled “A Proposal for Revising the MDS and ITFS Regulatory Regime” (“Proposal”). The Alliance objects specifically to two particular aspects of the proposed “bandplan” and “transition process” that disregard the rights of existing MDS licensees and forces them to bear transitional costs that should be borne by the operators seeking to deploy the next generation of broadband technology (“Proponents”).

The first is the proposed “opt-out” provision, which will be available only to those MDS licensees that can certify that they are multichannel video programming distributors (“MVPD”) providing service to 5% or more of the households within their GSAs. The second is the recommendation that MDS licensees carry the burden of bearing their own expenses in transitioning to the new bandplan and complying with the post-transition rules.

The Commission can implement a new bandplan without exceeding its authority or trampling on vested interests of MDS licensees by insuring that any implementing regulations operate only prospectively. That can be accomplished simply by grandfathering operating MDS licensees at least for the term of their current licenses. Any technical modification of a grandfathered system necessitated by the new bandplan should be made at the Proponent’s expense.

Additionally, the Commission should recognize the interests of MDS BTA authorization holders that purchased their authorizations at an auction or from an auction purchaser. Their interests in their BTA authorizations may be protected by the Takings Clause of the Fifth Amendment and by common law contract principles. Because the transition plan proposed by Petitioners could implicate protected interests, and to avoid any possible Tucker Act claims, the Commission should grandfather MDS BTA authorization holders. However, if they are forced to transition to the new handplan, MDS BTA authorization holders should be afforded a cost-free means to do so. To this end, the Commission may employ “relocation rules” similar to those used for the migration of point-to-point microwave licensees.

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The Alliance of Independent Wireless Video Operators ("the Alliance"),¹ by its attorneys, and pursuant to the Bureau's Public Notice, DA 02-2732 (Oct. 17, 2002), hereby submits its comments on the paper entitled "A Proposal for Revising the MDS and ITFS Regulatory Regime" ("Proposal") submitted by The Wireless Communications Association International, Inc., ("WCAI"), the National ITFS Association, and the Catholic Television Network (collectively "Petitioners"). The Alliance does not oppose the Proposal generally, nor object to the issuance of a notice of proposed rulemaking, but it opposes those aspects

¹The initial members of the Alliance are Evertek, Inc. ("Evertek"), 391 Communications, L.L.C. ("391 Communications"), United Telephone Mutual Aid Corp., PinPoint Communications, Inc., SkyCable TV of Madison, Dennis Puvalowski d/b/a Choice TV, Consolidated Telcom, Central Dakota TV, Salina-Spavinaw Telephone Company, Inc., Northwest Communications Cooperative, Starcom, Inc., Northern Rural Cable TV Cooperative, and Southeast Rural Vision Enterprise Co./Cass County Electric Cooperative, Inc. Evertek holds the MDS BTA authorizations for Fort Dodge, Mason City and Sioux City, Iowa. 391 Communications is the MDS BTA authorization holder for Upsala, Minnesota. The other members of the Alliance are small market, 2.5 GHz band MDS licensees that provide multichannel video and/or data services.

of the proposed “bandplan” and “transition process” that disregard the rights of existing 2.5 GHz band MDS licensees and forces them to bear transitional costs that should be borne by those operators seeking to deploy the next generation of MDS/ITFS broadband technology (“Proponents”).

INTRODUCTION

In the *Emerging Technologies* proceeding, the Commission adopted a transition plan that was intended to “reaccommodate” the existing licensees “in the manner most advantageous for [the] existing users, least disruptive to the public and the most conducive to the introduction of new service.” *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd 1542, 1545 (1992). There are more compelling reasons to accommodate and protect existing MDS licensees.

As Petitioners acknowledge, it has only been four years since the Commission first adopted rules to permit the routine licensing of MDS and ITFS facilities designed to deliver two-way broadband video, voice and data services. *See* Proposal at 1. The ink is barely dry on those rules and Petitioners are pressing the Commission for a “radical reworking of the MDS and ITFS regulatory structure.” *Id.* The adverse economic consequences of that “radical reworking” will fall most heavily on the 2.5 GHz band licensees, or multichannel video programming distributors (“MVPDs”), in the “relatively few markets where wireless cable [has] gained a foothold.” *Id.* at 2. The Alliance is comprised of some of the MVPDs that have gained that foothold.

DISCUSSION

The Alliance opposes two particular aspects of the Proposal. The most objectionable of the two is the proposed MVPD “opt-out” provision, which will be available only to those MDS licensees that can certify that they provide MVPD service to 5% or more of the households within their GSAs. *See* Proposal, App. B at 17. We believe that all MDS licensees that are providing MVPD service should be able to opt-out or be “grandfathered” at least for the remainder of their current license terms.

The Alliance also opposes placing the burden on MDS licensees “to bear their own expenses in transitioning to the new bandplan and complying with the post-transition rules.” *Id.* at 5. Traditionally, the Commission imposes the costs to transition an incumbent licensee on the “emerging technology licensee” that will benefit from the transition. *See, e.g., Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 12 FCC Rcd 2705, 2708 (1997). There is no reason to do otherwise in the event the Commission goes forward with the Proposal.

We will examine the Proposal as it will impact the respective rights conveyed by MDS licenses awarded by lottery and by MDS authorizations sold at auction. Although Congress did not intend that auctioned and non-auctioned licenses convey different rights, *see* 47 U.S.C. § 309(j)(6)(D), such differences are the legal consequence of employing dissimilar licensing schemes.

I. The Rights Conferred By The Recently Renewed
MDS Licenses Should Be Grandfathered Or Protected

Petitioners recognize that the transitioning process will require some existing licensees to modify their video systems and to cease their current service offerings. *See* Proposal, App. B at 4 n.9, 17. Thus, the rights of those licensees will be substantially infringed.

Under § 301 of the Communications Act (“Act”), an MDS licensee has “rights akin to those created by a property interest limited only by the ‘terms, conditions and periods of the license.’” *IRS v. Subranni (In re Atlantic Business and Community Development Corp.)*, 994 F.2d 1069, 1074 (3rd Cir. 1993) (quoting 47 U.S.C. § 301).² Although the right conferred by a license is not “an unlimited or indefeasible property right,” *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798 (D.C. Cir. 1948), “neither is it a non-protected interest, defeasible at will.” *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 674 n.19 (D.C. Cir. 1987). A properly granted MDS license is at least a “vested interest” which “must be given due weight in any consideration of fundamental fairness” by the Commission. *Reuters, Ltd. v. FCC*, 781 F.2d 946, 950 n.5 (D.C. Cir. 1986).

The Alliance includes licensees whose MDS licenses were recently renewed and do not expire until May 1, 2011. They sought the renewal of their licenses last year in reliance on a new regulatory structure that had been in place (at the instigation of WCAI) for only

²The Commission has indicated that licensees possess limited property rights in their licenses: “[T]he fact that Section 301 provides that licensees may have no ‘ownership’ interests in the frequencies does not mean that they have no rights in the license itself.” *Bill Welch*, 3 FCC Rcd 6502, 6503 n.27 (1988).

three years.³ Having justifiably relied on recently adopted rules, operating MDS licensees are entitled to a level of protection that outweighs the interests of those that “refrained” from constructing, or “chose to halt the deployment” of, first generation two-way systems. See Proposal at 4, 47. Under these circumstances, a rulemaking which effectuates a substantial modification of recently-renewed MDS licenses could be considered unlawfully retroactive and without statutory authority.

The Administrative Procedure Act (“APA”) requires that rules adopted in a notice and comment rulemaking be given future effect only. Therefore, the retroactive application of such rules is foreclosed. See, *e.g.*, *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997). A rule has a retroactive effect if it “takes away or impairs vested rights acquired under existing laws.” *Landgraf v. USI Film Products*, 511 U.S. 244, 269 & n.23 (1994) (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (1814) and *Sturges v. Carter*, 114 U.S. 511, 519 (1885)). The new rules contemplated by the Proposal would have a retroactive effect inasmuch as they would impair an MDS licensee’s vested right to operate within the “terms, conditions, and periods of the license.” Not only would some licensees be required to suspend operations in the process of transitioning, but they would be required to use different spectrum and be subjected to new technical requirements (particularly, signal strength limits).

³See Amendment of Parts 21 and 74 to Enable MDS and ITFS Licensees to Engage in Fixed Two-Way Transmissions, 13 FCC Rcd 19112, 19114 n.7 (1998), *modified*, 14 FCC Rcd 12764 (1999), *modified*, 15 FCC Rcd 14566 (2000).

The proposed new bandplan envisions radical license modifications which may be beyond the Commission's authority to effectuate by rulemaking. Certainly, the Commission has the authority under § 316 of the Act to modify a license, provided the licensee is afforded the opportunity to protest the proposed modification. *See* 47 U.S.C. § 316(a)(1). It is also authorized by § 303(f) of the Act to make changes in the frequencies and authorized power of a station without the consent of the licensee, if it determines that the change will serve the public interest or achieve compliance with the Act. *See* 47 U.S.C. § 303(f). However, the Commission may only make "routine" changes in a station's frequency and power under § 303(f). *See* H.R. Rep 104-458, at 186 (1996). Moreover, an MDS license may not be modified "except upon application to the Commission." 47 C.F.R. § 21.40(a). No provision of the Act explicitly authorizes the Commission to make wholesale license modifications by an APA rulemaking.

The Commission can implement a new bandplan without exceeding its authority or trampling on vested interests by insuring that any implementing regulations operate only prospectively: That can be accomplished simply by grandfathering operating MDS licensees at least for the term of their current licenses. Any technical modification of a grandfathered systems

necessitated by the new bandplan should be made at the Proponent's expense.

⁴Regardless of its legal authority, the Commission must weigh the vested interests of its MDS licensees when it considers the fundamental fairness of the proposed bandplan and transition process. *See Reuters*, 781 F.2d at 950 n.5.

11. MDS BTA Authorization Holders Should Be Grandfathered Or Compensated For Involuntary Transitioning

The rights of MDS BTA authorization holders stand on a different footing. They *purchased* their authorizations at the MDS auction that closed in March 1996 and raised \$216 million for the U.S. Treasury. Consequently, MDS BTA authorization holders possess rights beyond those conveyed by non-auctioned licenses. Their interests in their authorizations may be protected by the Takings Clause of the Fifth Amendment and **by** common law contract principles.

Although Congress did not recognize additional rights for licensees who obtain their licenses by auction, that fact does not control whether the Constitution requires that such licenses be deemed property for purposes of the Takings Clause. *See, e.g., Cleveland v. United States*, 531 U.S. 12, 25-26 & n.4 (2000) (recognizing that Louisiana “video poker licensees may have property interests in their licenses,” notwithstanding Louisiana’s statutory provision that such licenses do not constitute property under the state or federal constitutions). Although property rights “are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law,” rather than by the Constitution, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), “the government does not have unlimited power to redefine property rights.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998) (“a State may not sidestep the

Takings Clause by disavowing traditional property interests”); *Schneider v. California Dep’t of Corrections*, 151 F.3d 1194, 1200 (9th Cir. 1998) (There is “a ‘core’ notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny”).

Auctioned MDS licenses have the unmistakable attributes of constitutionally protected property. Certainly, an MDS license has value, and can be bought and sold. The Act calls on the Commission to sell licenses to the highest bidder for the purpose of recovering for the public a portion of the “value” of the spectrum made available for commercial use. *See* 47 U.S.C. § 309(j)(3)(C). An MDS license has sufficient attributes of property to allow the Commission to obtain a first lien on, and a security interest in, all of the licensee’s rights and interest in the license. *See* 47 C.F.R. §§ 1.2110(g)(3), 21.960(b)(4). By taking security interests in licenses, the Commission effectively acknowledged that the licensees had property interests or rights in the licenses to which security interests could attach.⁵

The National Telecommunications and Information Administration (“NTIA”) has recognized that Commission licenses convey limited property rights. NTIA, U.S. Dep’t of Commerce, *U.S. Spectrum Management Policy: An Agenda for the Future* at 113 (1991). NTIA explained that non-auction licenses generally have the attributes of private property

⁵*See In re Kansas Personal Communications Services, Ltd.*, 252 B.R. 179, 184 (Bankr. D. Kan. 2000), *rev’d on other grounds, United States v. Kansas Personal Communications Services, Ltd. (In re Kansas Personal Communications Services, Ltd.)*, 256 B.R. 807 (D. Kan. 2000).

to some extent: “Licensees receive ‘exclusivity’ in terms of authorization to use specific frequencies and protection from harmful interference, to the extent specified in the license. Licensees can receive income from the use of the license. Finally, licensees have the *defacto* right to transfer a license as part of a sale of assets, even though FCC approval is required.” *Id.* **NTIA** thus concluded that, “despite the possibility of license revocation under certain circumstances and other regulatory constraints, current spectrum licenses have some of the attributes of property.” *Id.*

Licenses have been held to constitute property for purposes of the Takings Clause. In *United States v. Smoot Sand & Gravel Corp.*, 248 F.2d 822 (4th Cir. 1957), for example, the court held that rights granted by state statute to riparian landowners to remove sand and gravel from tideland waters owned by the state were property rights requiring compensation upon condemnation of the landowner’s land. The court explained:

It cannot be disputed that when one is assigned the right, pending its revocation, to use or consume something *to* the exclusion of **all** others, and to receive compensation from anyone who ventures to exercise the privilege without his authority, he has a species of property, regardless of what theory of property we may adopt . . . Whether the right with which the owner is endowed by this statute is called a revocable though unrevoked ‘license,’ . . . is immaterial. The label does not matter; the substance cannot be taken away by the United States even for a public use without the owner being made **whole**.⁶

We recognize that the Commission takes the position that its licenses do not convey

⁶*United States v. Smoot Sand & Gravel Corp.*, 248 F.2d at 827-28.

property rights protected by the Takings Clause.⁷ We also recognize that at least one court indicated in *dicta* that auctioned licenses do not convey a property right.’ However, no court has held that an auctioned license is left unprotected by the Takings Clause. Therefore, MDS BTA authorization holders are not foreclosed from making the persuasive argument that when private enterprises invest millions of dollars in licenses to use specific spectrum to the exclusion of all others, and possess a *de facto* right to transfer the licenses, subject to Commission approval, traditional notions of private property would apply to the licenses to prevent the government from taking them without just compensation.

If it adopts the “radical” rule changes proposed by Petitioners, *see* Proposal at 1, the Commission will effect the “taking” of any property rights in the MDS BTA authorizations. Those authorizations necessarily will be superseded by new licenses to use new frequencies subject to new terms and conditions. In effect, the MDS BTA authorizations will be taken away by the Commission based on the determination that the “changes will promote public convenience or interest or will serve public necessity.” 47 U.S.C. § 303(f). That would constitute a governmental taking of property rights for “public use” requiring the payment

⁷*See, e.g., 1998 Biennial Regulatory Review - - Streamlining of Mass Media Applications, Rules, and Processes*, 14 FCC Rcd 17525, 17536-37 (1999).

⁸*See FCC v. Next Wave Personal Communications, Inc. (In re Next Wave Personal Communications, Inc.)*, 200 F.3d 43, 50-51 (2nd Cir. 1999) (“*NextWave*”).

of “just compensation” under the Fifth Amendment.⁹

MDS BTA authorization holders also may make the weighty argument that they entered into contracts to buy their authorizations. And contract rights are a form of property within the meaning of the Fifth Amendment. *See Franconia Associates v. United States*, 240 F.3d 1358, 1365 (Fed. Cir. 2001); *B&G Enterprises, Ltd. v. United States*, 220 F.3d 1318, 1323 (Fed. Cir. 2000); *Greenbrier v. United States*, 193 F.3d 1348, 1356 (Fed. Cir. 1999).

An auction is a mechanism for the exchange of an offer and acceptance, thus inherently producing a contract. The close of the auction constitutes the acceptance of the bid, or offer, and creates “an executory contract of sale.” 7 Am. Jure. 2d *Auctions and Auctioneering* § 34 (1997); *see* U.C.C. § 2-328 (1999). The Commission correctly summarized the common law of auctions to the Second Circuit:

Among the legal ground rules “implicit in a sale by auction,” *Lawrence Paper Co. v. Rosen & Co.*, 939 F.2d 376, 378 (6th Cir. 1991), is the understanding “that a bid constitutes an offer and the fall of the hammer signifies acceptance,” *United States v. Conrad*, 619 F. Supp. 1319, 1321 (M.D. Fla. 1985); *see also* *Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 289 (1995). Thus the acceptance of an auction bid “creates a binding contract between the seller and the high bidder,” *Conrad*, 619 F. Supp. at 1321, and “[t]hereafter . . . the seller has no right to accept a higher bid, nor may the buyer withdraw his

⁹In order to determine whether a government regulation constitutes a taking, a court considers “(1) ‘the economic impact of the regulation on the claimant’; (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations’; and (3) ‘the character of the government action.’” *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

bid,” Lawrence Paper Co., 939 F.2d at 379 (internal quotation marks omitted). This fundamental principle is deeply ingrained in the law. See Blossom v. Railroad Co., 70 U.S. (3 Wall.) 196, 206 (1865) (“as soon as the hammer is struck down...the bargain is considered concluded, and the seller has no right afterwards to accept a higher bid nor the buyer to withdraw from the contract”).”

The Court of Federal Claims, which has exclusive jurisdiction over contract claims against the government, including claims arising under the Takings Clause, has applied common law contracts principles to a federal government auction. *See Commodities Recovery*, 34 Fed. Cl. at 289. Viewing a federal government auction sale “under the same rules pertaining to the formation of contracts generally,”” the claims court held that a contract is formed at a government auction “upon the fall of the hammer.” *Commodities Recovery*, 34 Fed. Cl. at 289. That decision has been followed by the Second Circuit” and

“Brief for Appellant at 43 n.*, *NextWave* (2nd Cir. 1999) (No. 99-5063).

“The court followed 1 Samuel Williston, *Williston on Contracts* § 29 (3d ed. 1957) (“*Williston*”), U.C.C. § 2-328 (1990), and three federal court decisions that applied state law. *See Commodities Recovery*, 34 Fed. Cl. at 289.

¹²In *NextWave*, the court found a binding contract was formed at the “drop of the hammer” at the PCS C Block auction of licenses, even though the “contract had more terms than would be common at the auction of a saleable thing by a private seller.” 200 F.3d at 50-51. The court held that, when the winning bids were announced, “the FCC was obligated to deliver the Licenses at the agreed-upon price if NextWave could demonstrate that it met certain statutory and regulatory eligibility requirements, and NextWave assumed the risk of its failure to do so. The FCC was bound, and so was NextWave.” *Id.* at 62.

by the Commission.¹³

MDS BTA authorization holders can claim that they entered into contracts with the Commission to purchase authorizations to operate on specific frequencies on an exclusive basis for a ten-year term.¹⁴ Having entered into contracts that presumably bound the Commission by the same contract law principles that apply to contracts between private individuals, *see Mobil ~~oil~~ Exploration v. United States*, 530 U.S. 604, 607 (2000), MDS BTA authorization holders may argue that the Commission breached the contracts if it unilaterally changed the terms of the contracts by rulemaking. *See United States v. Winstar Corp.*, 518 U.S. 839, 884-88 (1996) (plurality opinion). If those changes substantially impair

”Following *Commodities Recovery* and *Next Wave*, the Commission held that the announcement of the winning bid in one of its auctions, “like the acceptance of high bids in auctions in other settings, terminates the bidding and establishes, as of the moment of the acceptance of the high bid, the binding obligation to pay the winning bid price for the licenses.” *See BDPCS*, 15 F.C.C.R. 17590, 17599-600 (2000) (footnotes omitted).

¹⁴An MDS BTA authorization holder does not have to rely on auction law to show that a contract was formed. It is well-established that “a contractual relationship arises between the government and a private party if promissory words of the former induce significant action by the latter in reliance thereon.” *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1018 (Fed. Cir. 1996); *Quiman, S.A. de C.V. v. United States*, 39 Fed. Cl. 171, 177 (1997); *National Rural Utilities Cooperative Finance Corp. v. United States*, 14 Cl. Ct. 130, 137 (1988). That the government’s promise was contingent upon the “performance of numerous conditions does not make the promise any less binding. Indeed, the essence of a unilateral contract is that one party’s promise is conditional upon the other party’s performance of certain acts and when the other party performs, the first party is bound.” *Wells Fargo*, 88 F.3d at 1019. An MDS BTA authorization holder can make the case that it was induced to pay its bid amount to the Commission in reliance on the promise that it would be issued a license that would allow it to operate within the “terms, conditions, and periods of the license.”

the value of their contracts, the licensees could claim that they are entitled at least to restitution. *See Mobil Oil*, 530 U.S. at 608 (citing *Restatement (Second) of Contracts* §§ 243, 250, 373 (1979)). It arguably could also claim a “taking” of contract rights for the public benefit under the Fifth Amendment. *See Armstrong v. United States*, 364 U.S. 40, 48-49 (1960) (compensable property interests “taken” under Fifth Amendment when government destroyed value of liens).”

We do not suggest that the adoption of the Proposal will necessarily result in violations of the Fifth Amendment, breaches of contracts, or Tucker Act claims against the government. We do suggest that the transition plan proposed by Petitioners could implicate the protected interests of those that acquired MDS BTA authorizations by auction. By grandfathering MDS BTA licensees, *see supra* p. 6, the Commission can avoid the possibility that the adoption of a new bandplan will prompt the parade of horrors that we have suggested. Moreover, to insure that they suffer no injury if they are forced to transition to the new bandplan, MDS BTA licensees should be afforded a cost-free means to do so. To this end, the Commission may employ “relocation rules” similar to those used for the

¹⁵*See Buse Timber & Sales, Inc. v. United States*, 45 Fed. Cl. 258, 262 (1999) (“in cases where the rights respecting the ‘taken’ material were not reduced to writing by the parties, both takings and breach claims have been permitted”); *Integrated Logistics Support Systems Int’l, Znc. v. United States*, 42 Fed. Cl. 30, 34-35 (1998) (because the court could not conclude that the rights asserted were conferred expressly by contract, takings and breach of contract claims could be plead in the alternative); *National Micrographics Systems, Inc. v. United States*, 38 Fed. Cl. 46, 50-54 (1997) (court reaches the merits of breach of implied contract and takings claims).

migration of point-to-point microwave licensees. *See* 47 C.F.R. §§ 24.239-24.253, 101.69-101.81.

We hope that these comments prove helpful to the Commission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Russell D. Lukas'.

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November 14, 2002

CERTIFICATE OF SERVICE

I, Loren B. Costantino, a legal assistant in the law offices of Lukas, Nace Gutierrez & Sachs, Chartered, do hereby certify that I have on this 14th day of November, 2002, sent by Hand-Delivery, copies of the foregoing Comments of The Alliance of Independent Wireless Video Operators to the following:

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A handwritten signature in black ink, reading "Loren B. Costantino". The signature is stylized with a large, looped "L" and a cursive "Costantino".

Loren B. Costantino